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In the Supreme Court of the United States

OCTOBER TERM, 1977

ELIZABETH JANE YOUNG CHIN, PETITIONER

v.

UNITED STATES OF AMERICA

KENNETH CHIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The court of appeals wrote no opinion. The opinions of the district court (No. 77-26, Pet. App. 7a-15a) are not reported.

JURISDICTION

The judgment of the court of appeals (No. 77-26, Pet. App. 5a-6a; No. 77-32, Pet. App. 1a-2a) was entered on March 21, 1977. A petition for rehearing with suggestion for rehearing *en banc* (No. 77-32, Pet. App. 3a-5a) was denied on May 10, 1977. Mr. Justice Marshall extended the time for filing the petitions for a writ of certiorari in both cases to and including July 5, 1977, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause barred petitioner Elizabeth Chin's retrial on a substantive count, following the first jury's failure to reach a verdict on that count and its entry of a verdict of acquittal on the charge of conspiracy to commit that offense.

2. Whether the warrant issued to search petitioners' residence was valid.

3. Whether the district court's instructions were proper.

4. Whether the evidence was sufficient to establish Kenneth Chin's participation in the acquisition or transportation of the firearm.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, both petitioners were convicted of unlawful transportation

into New York of a firearm purchased in California, in violation of 18 U.S.C. 2 and 922(a)(3). Petitioner Kenneth Chin was also convicted on a second count of receiving that firearm in New York, in violation of the same statutes. Kenneth Chin was sentenced to concurrent terms of three years' probation on each count. Elizabeth Chin was also placed on three years' probation. The court of appeals affirmed (No. 77-26, Pet. App. 5a-6a; No. 77-32, Pet. App. 1a-2a).

1. The trial was the second involving charges against the petitioners. On November 11, 1975, petitioners were indicted on one count of transporting into New York four firearms obtained by them in California, in violation of 18 U.S.C. 2 and 922(a)(3), and one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371. The government's motion for a severance was granted, and petitioner Elizabeth Chin was tried on April 12, 1976. The jury returned a verdict of not guilty as to the conspiracy count (1 Tr. 607)[1] but failed to reach an agreement as to the substantive count, and the district court declared a mistrial as to that count (1 Tr. 630).

2. Subsequently, on April 19, 1976, a superseding eight-count indictment was returned against petitioners, charging each with four counts of transporting firearms from California to New York and four counts of receiving those firearms.[2] In brief,

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[1] "1 Tr." refers to the transcript of the first trial; "2 Tr." refers to the transcript of the second trial.

[2] Count one charged both petitioners with transporting an Armalite AR-180 semi-automatic rifle ("the first AR-180");

the evidence at trial showed that on October 4, 1975, agents of the United States Secret Service conducted a search pursuant to a warrant at an apartment leased by petitioners in Brooklyn, New York. They found a small arsenal of firearms and ammunition,[3] including the subject of the first two counts, an Armalite AR-180 semi-automatic rifle which had been sold to petitioner Elizabeth Chin by Cole's Sporting Goods in Inglewood, California on July 29, 1975. Also seized from the apartment or elsewhere were the three other weapons that were the subjects of the six other counts,[4] as well as other weapons with respect to which petitioners were not charged.

At the close of the evidence, the court dismissed the four counts of receipt against Elizabeth Chin. The jury found Elizabeth Chin guilty of transporting both AR-180's (Counts 1 and 3), and acquitted

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count two charged both petitioners with receiving that weapon. Count three charged both petitioners with transporting a second AR-180; count four charged both petitioners with receiving that weapon. Count five charged both petitioners with transporting an Armalite AR-7 semi-automatic rifle; count six charged both petitioners with receiving that weapon. Count seven charged both petitioners with transporting an M-1 carbine; count eight charged both petitioners with receiving that weapon. All transportation counts alleged that the petitioners transported the weapon specified from California to New York; all receiving counts alleged receipt of the weapon in New York.

[3] The agents seized several semi-automatic weapons, pistols, knives, magazines and boxes of ammunition, photographs of which are at pages A-18 to A-20 of the Government's Supplemental Appendix in the court of appeals. A copy of the Supplemental Appendix has been lodged with the Clerk.

[4] See note 2, *supra*.

her of the charges of transporting the AR-7 and the M-1 carbine. Kenneth Chin was found guilty of transporting and receiving the two AR-180's (Counts 1 through 4) and acquitted of transporting and receiving the AR-7 and the M-1. At sentencing, the district court ruled that the indictment was multiplicious and set aside the conviction and dismissed the indictment of Elizabeth Chin for transporting the second AR-180 (Count 3), leaving only the conviction for transporting the first AR-180 (Count 1). The court also set aside the convictions and dismissed the indictment of Kenneth Chin for transporting and receiving the second AR-180 (Counts 3 and 4), leaving only the conviction for transporting and receiving the first AR-180 (Counts 1 and 2) (Sentencing Hrg. 5-10).

ARGUMENT

1. Petitioner Elizabeth Chin contends (Pet. 9-11) that the Double Jeopardy Clause barred her retrial after she was acquitted on the conspiracy count and a mistrial was declared on the substantive count in the original indictment (charging transportation of all four firearms). Essentially, it is her claim that the verdict of acquittal on the conspiracy count necessarily determined in her favor not only that there was no illegal agreement between her and petitioner Kenneth Chin to transport the weapons, but also that she had changed her residence to California[5] at the

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[5] Petitioner's defense in both trials was that she was a resident of California at the time she purchased the weapons. This defense was directed at the fact that 18 U.S.C. 922(a)(3) prohibits transportation or receipt "in the State where

time the weapons were purchased, that both facts were essential to conviction of the substantive offenses charged in the superseding indictment, and therefore that the government was collaterally estopped from relitigating those issues.[6] See *Ashe* v. *Swenson*, 397 U.S. 436, 443, holding that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

Petitioner's claim must fail for two reasons. The first is that, unlike the situation in *Ashe* v. *Swenson*, petitioner's first trial included the charge upon which she was ultimately convicted. The jury at that trial did not acquit her of the charge but, instead, was unable to reach a verdict. Even if petitioner were

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[the defendant] resides" of any firearm obtained "by such person outside that State," subject to exceptions not here relevant. Thus, proof that petitioner resided in a state other than California, where the weapons were purchased, was necessary to convict. The government charged that petitioner Elizabeth Chin was a resident of New York; the court instructed the jury that it must so find in order to convict (2 Tr. 781-782).

[6] She also claims (Pet. 11) that "the charges of conspiracy and violation of the substantive weapons count merge and accordingly the second prosecution was improper under Wharton's Rule." This contention is insubstantial. It has long been recognized that the commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *United States*, 328 U.S. 640, 643; see also *Pereira* v. *United States*, 347 U.S. 1; *Iannelli* v. *United States*, 420 U.S. 770.

correct that the failure to acquit on the substantive charge was inconsistent with the same jury's acquittal on the conspiracy charge, it is the settled rule that consistency in verdicts is not required. *Hamling* v. *United States*, 418 U.S. 87, 101. Accordingly, the failure of the jury to agree upon a verdict on the substantive count at the first trial rendered petitioner subject to retrial on that charge under the traditional "manifest necessity" doctrine (*United States* v. *Perez*, 9 Wheat. 579), irrespective of the jury's disposition of other charges considered at the same trial. See *United States* v. *McGowan*, 385 F. Supp. 956 (D. N.J.). Petitioner cannot successfully maintain that the jury at the first trial "necessarily" acquitted her of the substantive charge when in fact it did no such thing.

Even had petitioner not been tried at the first trial on the substantive charge, her collateral estoppel claim under *Ashe* v. *Swenson* would fail because an examination of the record of the first trial establishes that the conspiracy acquittal did not necessarily determine in her favor any fact required for conviction on the substantive count here at issue. The only disputed fact in connection with the substantive conviction was whether petitioner was a resident of California or New York at the time she acquired the firearm. The district court instructed the jury at the first trial that to find her guilty of conspiracy, it need not determine that she resided in New York, but only that one of the conspirators was a New York resident (1 Tr. 564-565). Kenneth Chin, the

alleged co-conspirator, was admittedly a New York resident (1 Tr. 465, 471). Moreover, the court charged that in order to convict Elizabeth Chin on the substantive count, the jury had to find that at the time of the events in question, she was a resident of New York (1 Tr. 550). Accordingly, had the jury resolved the residency issue in her favor in reaching its acquittal on the conspiracy charge as petitioner contends that it did, the court's instruction on the transportation count would have compelled the jury to acquit her on that count as well. The fact that it did not do so dooms petitioner's claim of collateral estoppel.

Petitioner also relies (Pet. 10) on *Sealfon* v. *United States*, 332 U.S. 575. That case does not support her position. In *Sealfon* the defendant was tried and acquitted of conspiring to defraud the United States by submitting false invoices. Subsequently, he was tried and convicted of aiding and abetting the submission of these same false invoices. In both instances, the government's case turned upon its contention that a letter from Sealfon to a co-defendant had been written pursuant to an agreement to violate the law. On the basis of an examination of "the facts adduced at each trial and the instructions under which the jury arrived at its verdict" (332 U.S. at 579), the Court concluded that the first jury's acquittal of the defendant on the conspiracy count could only have been based on a finding that the alleged illegal agreement did not exist. In those circumstances, this Court determined that Sealfon's conviction on the substantive charge depended upon a

fact necessarily adjudicated in his favor at the first trial and therefore reversed his conviction.

The instant case is dispositively different. Here petitioner's convictions on the substantive charges at the second trial did not depend on the existence of a conspiracy. For, unlike *Sealfon*, and contrary to petitioner's contention that she was "acquitted of the lesser offense" (Pet. 9), this is not a case where "the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense" (332 U.S. at 578-579). "Nothing in the Sealfon case indicates that a conspiracy acquittal in an earlier trial bars conviction at * * * a later trial of being an actual principal." *Robinson* v. *United States*, 175 F.2d 4, 10 (C.A. 9), certiorari denied, 338 U.S. 832; cf. *United States* v. *Curzio*, 170 F.2d 354 (C.A. 3).[7]

2. a. Petitioner Elizabeth Chin urges (Pet. 18-19) that the affidavit supporting the warrant issued

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[7] Elizabeth Chin also argues (Pet. 11) that retrial on a substantive count based on the evidence relating to the second AR-180 rifle (counts 3 and 4 of the second indictment) was barred by the Double Jeopardy Clause because the court withdrew that evidence from jury consideration at the first trial. That ruling, however, "was an evidentiary ruling only" (Pet. App. 13a), made by the court in a stated overabundance of caution (see 1 Tr. 489-505), "and did not determine the guilt or innocence of [Elizabeth Chin] with respect to the crimes charged" (Pet. App. 13a-14a). Accordingly, "the ruling [did] not bar prosecution for importing [*sic*] and receiving the subject weapon as charged in Counts Three and Four of the superseding indictment" (*id.* at 14a). In any event, the court dismissed the count charging receipt of that weapon and set aside petitioner's conviction for transporting it (*see* page 5, *supra*), so the matter is now moot.

to search her apartment was insufficient to establish probable cause to believe either that a crime had been committed or that a firearm was present at her residence.

On October 3, 1975, the Secret Service obtained a warrant to search petitioners' residence in Brooklyn, New York for a semi-automatic rifle. The warrant was issued on the basis of an affidavit executed by Secret Service Agent Neal Findley, stating that he had reason to believe that, in purchasing the weapon, Elizabeth Chin had used a driver's license which falsely represented that she was a resident of California.[8] In support of that belief, Findley stated that a Secret Service agent had been told by a salesman at Cole's Sporting Goods Store in Inglewood, California that on July 29, 1975, he had sold an AR-180 semi-automatic rifle, serial number S-12585, to Elizabeth Jane Young (Elizabeth Chin's maiden name) for $270 and that she had represented her address to be Los Angeles, California (Pet. App. 8a-9a, n. 3). The affidavit also related that postal records reflected her

[8] 18 U.S.C. 922(a)(6) provides that it is unlawful

> for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

change of address from California a year prior to the sale, first to Jackson Heights, New York, and subsequently to 925 Union Street, Apartment 4B, Brooklyn, New York (*ibid.*). Finally, the affidavit stated that petitioner was presently residing at the Brooklyn address (*ibid.*).

These facts were sufficient to warrant the conclusion that, when the weapon was purchased, Elizabeth Chin resided not in California, as she had represented, but in New York. Because it is unlawful for a dealer to sell a firearm without recording, *inter alia*, the purchaser's place of residence (18 U.S.C. 922(b)), the misrepresentation of residency was material. *United States* v. *Gudger*, 472 F.2d 566, 568 (C.A. 5); *United States* v. *Crandall*, 453 F.2d 1216, 1217 (C.A. 1). Accordingly, the affidavit provided probable cause to believe that petitioner Elizabeth Chin had committed a violation of 18 U.S.C. 922(a)(6).[9]

Moreover, the facts alleged supported the magistrate's conclusion that evidence of that crime—the semi-automatic rifle—would probably be found in petitioner's apartment. That conclusion required that the following inferences be drawn from the facts stated in the affidavit: (1) that Elizabeth Chin

[9] *United States* v. *Mendoza*, 487 F.2d 309 (C.A. 5), upon which petitioner relies (Pet. 19), is inapposite. That case involved the sufficiency of evidence to sustain a conviction, rather than sufficiency of allegations establishing probable cause to issue a search warrant. A showing of probable cause does not require proof sufficient to establish guilt. *Brinegar* v. *United States*, 338 U.S. 160, 173.

bought the weapon for her personal use (or at least that she did not dispose of it in California); (2) that she brought it with her from California to her New York home, or caused it to be brought there; (3) that she kept it in her home; and (4) that it was still there 66 days after she bought it. Of course, "[i]t was not necessary for the government to submit direct evidence that the firearm was on the premises to be searched. The probability that it was there is sufficient" (Pet. App. 10a). See *United States* v. *Mulligan*, 488 F. 2d 732, 736 (C.A. 9), certiorari denied, 417 U.S. 930; *United States* v. *Lucarz*, 430 F. 2d 1051, 1055 (C.A. 9).

The propriety of inferring the presence of a chattel in a person's home from a person's prior purchase of the chattel depends upon the facts of the particular case. It requires consideration of a number of factors, including the kind of chattel involved, the legality of the acquisition or possession of the chattel, the time interval between the acquisition and its presumed presence in the purchaser's home, and the likelihood that the purchaser transported the chattel to his home after the acquisition. The mere fact of purchase, standing alone, would not be sufficient to establish probable cause that the article subsequently would be found in the purchaser's home. "If that were so, there would be no reason to distinguish search warrants from arrest warrants, and cases like Chimel v. California, 395 U.S. 752 * * * would make little sense." *United States* v. *Lucarz*, *supra*, 430 F. 2d at 1055.

Although the question is close, we believe that the facts stated in the affidavit in this case justified the inference by the magistrate that there was probable cause to believe that the weapon would be found in Elizabeth Chin's home. The affidavit stated that the weapon had been purchased for $270—a considerable amount of money—and that, since purchasing the weapon, petitioner had returned to her home in New York. Furthermore, as the district judge stated, "[t]he likely place for concealment of a semi-automatic weapon"—as opposed to other things one might possess—"would be the owner's home" (Pet. App. 10a). Here, as in *Lucarz*, *supra*, "[t]he affidavit demonstrated the [purchase] of the sort of materials that one would expect to be hidden at appellant's place of residence, both because of their value and bulk. It showed that appellant had ample opportunity to make a trip home to hide" the weapon. 430 F. 2d at 1055.

In *United States* v. *Rahn*, 511 F. 2d 290 (C.A. 10), certiorari denied, 423 U.S. 825, the court of appeals concluded that there was probable cause to believe that a firearm acquired two years earlier would be found in the defendant's home. The court agreed with the district judge who, in upholding the search, stated, "It is reasonable to assume that his house was where he kept things and it is pretty normal I believe for individuals to keep weapons in their homes, particularly hunting weapons and weapons which may be kept for the safety of the family." 511 F. 2d at 293. The court of appeals recognized that "[a]dmittedly there are other places where the guns *might*

have been stored; yet we believe these facts and circumstances gave the magistrate probable cause to believe the weapons would be found as a result of the search of appellant's residence." *Id.* at 294 (emphasis in original). As the Eighth Circuit recognized in a similar situation, "[P]eople who own pistols generally keep them at home or on their persons." *United States* v. *Steeves*, 525 F. 2d 33, 38. Accord, *Bastida* v. *Henderson*, 487 F. 2d 860, 863 (C.A. 5) ("A very likely place to find [handguns] would either be on the persons of the assailants or about the premises where they lived.")[10]

As this Court said in *United States* v. *Ventresca*, 380 U.S. 102, 109, "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should

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[10] Contrary to petitioner's assertion (Pet. 18), the fact that she had purchased the weapon in California 66 days earlier did not undermine that probability. As the district court correctly held (Pet. App. 10a-11a):

> Lapse of time is not the sole variable in determining whether the belief as to someone's possession of evidence is reasonable. A week might conceivably be too long a period for the search of perishable goods such as narcotics. The test to be applied must be the reasonable probability of whether [petitioner Elizabeth Chin] would likely have disposed of an automatic rifle, purchased under the circumstances in the case at bar, within the period of time which had passed. The expectation that the firearm was at the premises at the time of the warrant's issuance was not unreasonable. Cf. *United States* v. *Steeves, supra*, 525 F. 2d at 37-38; *Bastida* v. *Henderson*, 487 F. 2d 860, 864 (C.A. 5).

be largely determined by the preference to be accorded to warrants." See *Jones* v. *United States*, 362 U.S. 257, 270. In sustaining the sufficiency of this particular affidavit, the lower courts used the proper legal standard. The question of the correctness of the application of that standard to these particular facts does not warrant review by this Court.

b. Petitioner also challenges (Pet. 19) a misstatement contained in a supplemental affidavit submitted to the magistrate reciting the Secret Service's concern that her possession of the firearm in question might pose a threat to the safety of Emperor Hirohito of Japan, who was to visit New York City the next day. The affidavit stated, among other things, that during 1973 petitioner resided at a specified address in Los Angeles with Joanne Miyamoto (Amicus Br. of Asian-American Legal Defense and Education Fund, App. A5). As Agent Findley attested in a subsequent affidavit filed in connection with the suppression hearing prior to petitioner's first trial, this statement was not correct; in fact, petitioner and Miyamoto lived in adjoining houses (*id.* at A13).

The district court rejected this claim, ruling that the original affidavit was sufficient to establish probable cause and that any "alleged misstatements in the supplemental affidavit are therefore inconsequential" (Pet. App. 11a). While it is true that there is authority for the proposition that, in the case of deliberate misstatements in a search warrant affidavit, the warrant may be invalid even though the misstatement was not necessary to the establishment

of probable cause (*e.g.*, *United States* v. *Belculfine*, 508 F.2d 58 (C.A. 1); *United States* v. *Carmichael*, 489 F.2d 983, 988-989 (C.A. 7) (*en banc*)), there is no suggestion here that the misstatement was a deliberate misrepresentation. It was, at worst, a negligent misstatement, and since its content was wholly immaterial to the establishment of probable cause to believe that petitioner had violated 18 U.S.C. 922(a)(6)—the ground on which the magistrate issued the warrant—there is no support for petitioner's claim that the warrant was invalid on account of the misstatement. See, *e.g.*, *United States* v. *Evers*, 552 F. 2d 1119, 1122 (C.A. 5); *United States* v. *Taxe*, 540 F. 2d 961, 967 (C.A. 9), certiorari denied, 429 U.S. 1040.

3. Petitioner Elizabeth Chin also challenges one instruction given by the district court and its refusal to give another.

a. In accordance with the provisions of 18 U.S.C. 926, the Secretary of the Treasury has defined state of residence as "[t]he State in which an individual regularly resides, or maintains his home * * *. * * * Temporary sojourn in a State does not make the State of temporary sojourn the State of residence." 27 C.F.R. 178.11. By way of example, the regulations provide that a person may be a resident of more than one State (*ibid.*):

> A maintains a home in State X and a home in State Y. He resides in State X except for the summer months of the year and in State Y for the summer months of the year. During the time that he actually resides in State X he is a resident of State X, and during the time that he actually resides in State Y he is a resident of State Y.

Elizabeth Chin therefore contends (Pet. 12-15) that the district court erred when it charged that "residence is domicile" and that "you can only have one residence" for purposes of Section 922(a)(3) (2 Tr. 797). Those instructions, however, were not prejudicial in the context of this case.

Throughout the trial, Elizabeth Chin's defense was that, at the time she purchased the weapons in California, she had abandoned her residence in New York and had gone to California to relocate permanently (see 2 Tr. 80-83, 675-676).[11] She stayed in California for about a month and then returned to her Brooklyn apartment (2 Tr. 497; Pet. 5). At no time did she claim to maintain residence in both States; indeed, such a claim would have been fatal to her defense, see note 5, *supra*. The court's instructions (2 Tr. 797-800) accurately charged that under the circumstances of this case, the crucial issue was whether Elizabeth Chin had become a resident of California when she went there for several weeks in the summer of 1975. "[C]onsidered in the context of the entire record of the *trial*" (*United States* v. *Park*, 421 U.S. 658, 674-675, quoting from *United States* v. *Birn-*

[11] Neither petitioner testified. This defense was put in through other witnesses.

baum, 373 F.2d 250, 257 (C.A. 2), certiorari denied, 389 U.S. 837 (emphasis in original)), the court's instructions on residency, to the extent mistaken, could not have affected the verdict and therefore did not deprive petitioner Elizabeth Chin of a fair trial. See *United States* v. *Jones*, 481 F.2d 653, 654 (C.A. 2).

b. Elizabeth Chin's further contention (Pet. 16-17) that the district court should have instructed the jury "that legitimate hunters were not the target" of Section 922(a)(3) is without merit since her alleged interest in hunting, even if proven, would be no defense to this charge.

The Gun Control Act of 1968 (82 Stat. 1213), of which Section 922(a)(3) is a part, does contain a stated purpose not to place "undue * * * Federal restrictions * * * on law-abiding citizens with respect to the acquisition * * * of firearms appropriate to the purpose of hunting * * *" (Section 101, 82 Stat. 1213-1214; Pet. App. 1a-2a). However, this objective was protected by wording the statute so as to permit sportsmen to transport firearms and ammunition purchased in their state of residence to and from interstate hunting sites, and by excluding "transportation or receipt of a rifle or shotgun obtained in conformity with the provisions of subsection [922](b)(3)." That subsection creates, *inter alia*, a specific, limited exception for non-resident hunters whose rifle or shotgun has been lost, stolen, or rendered inoperative in another state.

Petitioner has never suggested that her purchase and transportation of the rifle came within this exception. Accordingly, the claim that she may have been a hunter transporting the firearm for sporting purposes was irrelevant (cf. *United States* v. *Jones*, *supra*, 481 F.2d at 654-655). The district court properly excluded such evidence from the jury's consideration (see, *e.g.*, 2 Tr. 284-286, 295, 789) and correctly refused to instruct on congressional intent.[12]

4. Petitioner Kenneth Chin (No. 77-32) was convicted of unlawful receipt of the firearm purchased by Elizabeth Chin in California and of aiding and abetting her unlawful transportation of that firearm from California to New York. Upon our review of the record in this case, we have concluded that the evidence against Kenneth Chin was insufficient to sustain these convictions.

a. Under 18 U.S.C. 922(a)(3) it is unlawful, subject to exceptions not relevant here, "for any person

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[12] Petitioner seeks to bolster her argument by quoting (Pet. 16) from the floor debates on the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197. However, Section 922(a)(3), as enacted therein, applied only to the sale or purchase of firearms other than rifles or shotguns. 82 Stat. 229. Subsequently, that Section was specifically amended in the Gun Control Act of 1968 to include rifles and shotguns in those provisions previously applicable only to handguns. See H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968). In so doing, Congress expressly recognized that the bill would affect sportsmen by restricting *interstate* purchases and transportation of firearms but stated that hunting pursuits otherwise remained unhampered. *Id.* at 9; see also 114 Cong. Rec. 21773 (1968) (remarks of Congressman Latta).

* * * to transport into or receive in the State where he resides * * * any firearm purchased or otherwise obtained *by such person* outside that State * * *" (emphasis supplied). The evidence in this case unquestionably showed that the firearm Kenneth Chin was convicted of receiving had been purchased in California and that he was at all relevant times a resident of New York; the fact that the firearm was seized from his apartment in New York also suffices to support the conclusion that he received it in New York. Nevertheless, petitioner argues (Pet. 7-8)—and we are constrained to agree—that these facts alone are insufficient to make out the offense of receiving under Section 922(a)(3); that provision also requires proof that the receiver was involved, either directly or as an accessory, in the out-of-state acquisition of the firearm. Otherwise, the words "by such person" would, in effect, be read out of the statute. See *Swain* v. *Pressley*, 430 U.S. 372.

The district court's charge to the jury on the receipt count was inconsistent with the foregoing reading of the statute, since the charge did not require the jury, in order to convict, to find that petitioner had been involved, directly or indirectly, in the acquisition of the firearm in California. This omission was a result of the court's belief that "receipt means coming into possession of or getting or acquiring from a source outside oneself. In other words, in order to receive, somebody has to give it" (2 Tr. 787). If the court were correct that the words "by such person" are inherently inconsistent with the concept of receipt so that the statute necessarily contradicts itself, a nice question of statutory construction would be presented. But since one can purchase or obtain a firearm in another state without leaving one's state of residence (*e.g.*, by mail order or through the agency of a third party), we conclude that the receipt provision of the statute is not rendered meaningless by the provision requiring involvement of the defendant in the out-of-state acquisition. Accordingly, we believe that the district court was not justified in avoiding the plain meaning of the statutory words "by such person."

b. Beyond the problem arising from the defect in the district court's instructions on the statutory elements of the receiving offense is the question—common to both Kenneth Chin's conviction for receiving and his conviction for aiding and abetting Elizabeth Chin's illegal transportation of the firearm from California to New York—of the sufficiency of the prosecution's evidence to establish Kenneth Chin's involvement in the acquisition and transportation of the firearm.[13] Our review of the record compels us to agree with petitioner that the evidence was insufficient.

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[13] In connection with the transportation count the court did instruct the jury that it could convict only if it found that Kenneth Chin "participated knowingly and willfully as an aider and abettor" (2 Tr. 791).

There was no direct evidence at trial [14] of Kenneth Chin's participation in the acquisition and transportation of the firearm; rather, the evidence showed that those acts were performed by Elizabeth Chin, and she conceded such at trial (2 Tr. 674). Kenneth Chin was implicated, if at all, by the inferences to be drawn from his relationship to Elizabeth Chin, their mutual interest in firearms, and their joint possession of this firearm at the time of its seizure from their apartment. It was on the latter element that the district court principally relied in allowing the case to go to the jury, instructing it that "if you find that the weapon was transported from California into New York you may infer from [Kenneth Chin's] possession that the defendant Chin participated in the transportation of that weapon" (2 Tr. 794).

In instructing the jury in this fashion, the district court had in mind (2 Tr. 621) the familiar principle that a jury may reasonably infer from the defendant's possession of recently stolen property, if not satisfactorily explained, that the defendant was the

[14] There was evidence at the suppression hearing that, upon his arrest, Chin admitted that he and Elizabeth Chin had been in California together, that she had purchased the weapons at his request because he did not have a California driver's license, and that he had brought them back to New York (Supp. H. Tr. 16, 18, 19, 29-31). The district court ruled that the statements had been knowingly and voluntarily made and would be admissible, although not at a joint trial (*id.* at 74-75). Petitioners were tried jointly, and the statements were not offered into evidence at trial. Had they been, the evidence would have been ample to sustain the jury's verdict.

thief (see *McNamara* v. *Henkel*, 226 U.S. 520; *Dunlop* v. *United States*, 165 U.S. 486), that the defendant knew the property had been stolen (see *Barnes* v. *United States*, 412 U.S. 837), or that the defendant transported or aided in the transportation of the property across state lines (see *Beufve* v. *United States*, 374 F.2d 123 (C.A. 5), certiorari denied, 389 U.S. 881; but cf. *Bollenbach* v. *United States*, 326 U.S. 607).

We do not doubt that all of the foregoing inferences are often reasonable or that the inference alone may in many cases suffice to sustain the validity of a conviction. For example, if a bank is robbed and the defendant is found several hours later in possession of the loot, experience and common sense impel us irresistibly to the conclusion, in the absence of a satisfactory alternative explanation, that the defendant was involved in the theft and asportation of the loot. But the weight of the inference necessarily depends upon the totality of the evidence in any particular case, and even where the inference is permissible it will not always suffice, standing alone, to sustain a conviction.

As applied by the district court—and, presumably, the jury—in this case, the inference operated to sustain the conclusion that because the firearm was found in Kenneth Chin's apartment, it is likely beyond a reasonable doubt that he aided in its transportation from California. But unlike the conventional case of unexplained possession of stolen property, the evidence at this trial showed that it was not Kenneth Chin who

purchased the firearm in California and transported it to New York—those acts were done by Elizabeth Chin. While the jury may well have suspected, given the relationship between the two petitioners, that Kenneth Chin had a guilty involvement in these activities, we are unable to say that such suspicion is strong enough to justify submitting the case to the jury, since there is on this record too great a likelihood that Elizabeth Chin bought the weapon in California and brought it home with her to New York without Kenneth Chin's knowledge, and that he simply accepted it from her there (which, as previously discussed, would not violate the receipt prohibition of the statute).

CONCLUSION

The petition of Elizabeth Chin (No. 77-26) should be denied.

We do not oppose the granting of the petition of Kenneth Chin (No. 77-32) for the purpose of reversing the judgment of the court of appeals and remanding the case to the district court with instructions to enter a judgment of acquittal.

Respectfully submitted.

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